IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 77-1497

STATE OF ARKANSAS,

Petitioner,

vs.

LONNIE JAMES SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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This brief is filed under Rule 42 of the Rules of this Court. We have received written consent from counsel from the State of Arkansas to file, and a letter to this effect has been lodged with the Clerk of the Court. Counsel for Respondent Sanders has consented verbally by telephone to our filing and his written consent is being mailed to us. We will send his letter to the Clerk of the Court immediately upon receipt.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law;
2. To inform the public of those needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law-abiding citizens; and
3. To assist the police, the prosecution, and the court in promoting a more effective and fairer administration of the criminal laws.

The interest of the *amicus curiae* in this case stems from the importance of constitutional questions of search and seizure in the not-uncommon situation whereby officers encounter moveable hand luggage in automobiles when they have legitimately detained the occupants of such automobiles upon probable cause. The resolution of this case will have a direct and material impact upon the effectiveness of law enforcement.

ARGUMENT.

In *United States* v. *Chadwick*, 433 U. S. 1 (1977), this Court invalidated the warrantless search of a 200-pound, double-locked footlocker which had been removed from the trunk of an automobile and taken to the office of federal narcotics agents, after the arrest of the suspects involved.

This case is similar only in that it involves a warrantless search of luggage in an automobile; and we suggest that the factual differences between the two cases, together with important policy considerations, mandate that the search in this case be upheld.

I.

THE DIFFERENCES IN THE FACTUAL SITUATIONS BETWEEN CHADWICK AND THE INSTANT CASE ARE SUCH THAT THE SEARCH IN THE INSTANT CASE SHOULD BE SUSTAINED.

As we read the majority opinion in *Chadwick, supra,* the main reasons the warrantless search of the footlocker was held to be unconstitutional are as follows:

1. The footlocker was relatively immobile in a physical sense, weighing, as it did, some 200 pounds.[1]
2. The footlocker was *legally* immobile. It had been removed from the trunk of Chadwick's car and had

1. The weight of the footlocker is mentioned twice in the majority opinion, 433 U.S., at 4 and 5. Additionally, Mr. Justice Brennan, in his concurring opinion, referred specifically to the fact that the footlocker was "heavy." 433 U.S., at 17, n. 2. Mr. Justice Blackmun, also note this point in his dissenting opinion in *Chadwick:*

> Perhaps the holding in the present case will be limited in the future to objects that are relatively immobile by virtue of their size or absence of means of propulsion. 433 U.S., at 21.

been transported to the DALE offices in the John F. Kennedy federal building in Boston.[2]

3. The automobile from whose trunk the footlocker was seized had been impounded and driven to the federal office building by federal agents.[3]

4. All three suspects had been placed under arrest *prior to* the seizure of the footlocker from the trunk of Chadwick's car, and they had all been handcuffed and taken to the federal building.[4]

5. The search of the footlocker was remote in time from its seizure. It took place about an hour and a half later at the federal building.[5]

6. The footlocker was double-locked.

The factual situation in the instant case differs markedly from that in *Chadwick*:

1. The piece of luggage in this case was a suitcase, which is a far more moveable item than a 200-pound footlocker.[6]

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2. On this point, the majority states:

> Once the federal agents had seized it at the railroad station and had safely transferred it to Boston federal building under their exclusive control, *there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. Id.* at 13. (emphasis supplied).

3. Id. at 4.

4. Id.

5. Id.

6. The United States Court of Appeals for the First Circuit also held unreasonable the search of suitcases (as opposed to footlockers) in *United States* v. *Chadwick*, 532 F.2d 773 (1st Cir. 1976); however, the question of the constitutionality of the search of hand luggage was not reached by this Court in its decision in *Chadwick:*

> [T]he petition for certiorari draws into question only the footlocker search; consequently, we need not pass on the legality of Chadwick's arrest or the search of the suitcases. 433 U.S., at 5, n. 2.

2. The suitcase involved herein was unlocked and was still in the trunk of the taxicab when it was seized and searched. The stop of the taxicab was made on the street, in a metropolitan area at about 5:00 p.m. The suspects had not been arrested at the time of the search of the suitcase, but were detained by the police beside the taxicab.

3. The taxicab in which respondent Sanders and his colleague Rambo were riding had not been seized and driven away by the officers involved (as was the case with Chadwick's automobile), nor was it likely that the taxicab *could* legally have been seized by the police, since the relationship between the taxicab and the contraband was merely "coincidental."[7] There was no suspicion that the taxicab driver himself was involved.

4. As noted, neither of the suspects had been placed under arrest when the search of the suitcase was made. Although the lower court conceded that the Little Rock police had probable cause to arrest respondent Sanders and Rambo,[8] the fact remains that the arrest had not taken place when the search was made. All of those involved were standing on the roadside by the stopped taxicab. This is a very material difference from the situation in *Chadwick* where all parties, their automobile *and* the footlocker were securely in custody at the federal building.

5. The search of the suitcase was contemporaneous with the stop of the taxicab, albeit prior to the actual arrest of respondent Sanders; again, a marked difference from the situation in *Chadwick*.

Although the instant case and *Chadwick* are superficially similar in that they both involved warrantless searches (in which

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7. *Sanders* v. *State*, 559 S.W.2d 704, 706 (Ark. 1977).

8. Id.

probable cause was not contested) of "luggage" contained in a moveable vehicle, we submit that the similarities between the two cases are far outweighed by the differences: the character of the item searched (unlocked hand luggage as opposed to a double-locked 200-pound footlocker); the fact that no arrest had been made prior to the search in this case; and the remoteness in time and place from the seizure and search in *Chadwick* as compared to the contemporaneous nature of the seizure and search in this case.

We believe that the facts and circumstances in the instant case bring it far more within the "automobile exception" to the search warrant rule than was the case in *United States* v. *Chadwick, supra. Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Cady* v. *Dombrowski,* 413 U.S. 433 (1973); *Cardwell* v. *Lewis,* 417 U.S. 583 (1974). We will not argue this point at length, however, for we do not intend to reiterate the legal arguments made by the State of Arkansas (although we agree with them and wish to associate ourselves with them). We will confine our arguments herein to a brief discussion, developed in the next section of this argument, of the fact that when police officers make "on the street" stops based on probable cause, of vehicles, they should be permitted to search such vehicles and any hand luggage contained therein, in order to determine if a crime has actually been committed.

II.

IN THE CIRCUMSTANCES OF THIS CASE, AN EXIGENCY EXISTED TO SEARCH THE HAND LUGGAGE BEING TRANSPORTED BY RESPONDENT.

This Court has long recognized that "exigent circumstances" will, in certain cases, justify a search without a warrant. *McDonald* v. *United States,* 335 U.S. 451 (1948); *Ker* v. *California,* 374 U.S. 23 (1963). Indeed, Mr. Chief Justice Berger, writing for the majority in *Chadwick* recognized this fact:

> In our view, *when no exigency is shown to support the need for an immediate search,* the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. 433 U.S., at 15. (emphasis supplied).

In most instances, "exigent circumstances" are thought of in terms of the police function, i.e. destruction of evidence, *Ker* v. *California, supra;* the possibility of dangerous instrumentalities,[9] and so on. We submit, however, that the situation exemplified by the instant case may create a new sort of "exigency" which is tied not only to the law enforcement function but also to the consideration of the rights of those who happen to be stopped by the police on probable cause.

In this case, as in *Chadwick,* there was no question but that the police had probable cause to believe that narcotics activities were afoot.[10] They had legal grounds to stop the taxicab and to detain Sanders and Rambo. "Probable cause", however, is not *absolute proof* that the suitcase contained marijuana. From the point of view of the police officers, *and of suspects similarly situated,* there was a necessity, or exigency, to search the hand luggage *at the scene,* in order to determine whether an arrest should be made; and this is exactly what the police in this case did.

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9. On this point, the Court in *Chadwick* stated:

> Of course, there may be other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest; for example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house wtihout opening the baggage and disarming the weapon. 433 U.S., at 15, n. 9. (citation omitted).

10. In *Chadwick,* thanks to the "alerting" of the detector dog, "Duke", "probable cause" to believe that marijuana was contained in the footlocker rose almost to a certainty. In the instant case, probable cause was based on police observations which in turn were based on a reliable informant's tip, plus corroboration by the suspects being in the right place and at the right times as had been foretold by the informant. *Draper* v. *United States,* 358 U.S. 307 (1959). There was no *certainty,* however, that the green suitcase did, in fact, contain marijuana.

Consider, for example, the situation which would have confronted the police, and the suspects had the green suitcase *not* contained marjuana, either because Sanders was innocent of any connection with the narcotics traffic, or (perhaps more realistically) because whatever "deal" he was involved in had not gone through. Sanders and Rambo would have been detained during the period of time in which the police secured a search warrant; and, since the stop took place about 5:00 p.m, on a Friday afternoon—after usual business hours—the delay might not have been inconsiderable.

An immediate search, in cases such as this one, will establish the fact of guilt or innocence of the crime of narcotics transportation fairly conclusively. If contraband (or other evidence of crime) is present, an immediate arrest will result, as it did in this case. If it is not found, the "suspects" will be permitted to go on their way; the detention of the suspects will have been minimal, as compared with the far more lengthy detention involved if they are transported to the police station and have to wait while the officers procure a search warrant for the hand luggage involved.

Herein lies the "exigency" which we postulate. Law enforcement officers in cases such as this, who have *probable cause* to believe a crime is being committed, but who have no *certainity* that the suspects are actually in possession of contraband, have an absolute need to make a contemporaneous search in order to determine if the crime has, in fact, been committed.

Any other holding would create a *per se* rule to the effect that, when hand luggage is involved, there must be a waiting period while a search warrant is procured to establish the factual existence, or non-existence, of the criminal act. Such a *per se* rule will hamper effective law enforcement procedures; but, more importantly, it will require lengthy detentions of persons who *may* be innocent.

We believe that the time factor—the period of detention while a search warrant is procured—to be of critical importance

in cases such as this one. This time factor becomes even more important if a *per se* rule were to be established, because such a rule would affect every law enforcement jurisdiction in the United States, and there are certain rural jurisdictions in which the procedure to secure a search warrant can take many hours —perhaps even days.

Amicus in this case had the opportunity to address this question, in a related context, in the case of *United States* v. *Bozada,* 473 F.2d 389 (8th Cir. 1973) (en banc). *Bozada* involved the warrantless search of a large truck trailer, full of stolen shoes, made by police officers of the City of St. Louis, Missouri. The question involved was whether it was necessary for the police, who had reliable information that the truckload of stolen property was soon to be moved, to procure a search warrant before seizing and searching the trailer.[11] A three-judge panel of the U. S. Court of Appeals for the Eighth Circuit had originally held that the warrantless search of the truck was illegal.[12] However, on rehearing *en banc,* the court held, 6-2 that the search was legal.[13]

Bozada involved the search of a vehicle, not of luggage, and we do not claim that it is on all fours with the instant case. Nevertheless, the "time element" question is similar to the point which we raised in *Bozada:* in many instances, particularly in rural areas, it may be a matter of many hours—perhaps extending into days—before a search warrant can be secured.

We respectfully urge this Court to consider the following situations, with regard to the securing of search warrants, which are taken from a survey of sheriff's departments in seven

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11. At the time of the search, the trailer was unattached to a tractor; however, it was in all other ways ready to move and a tractor could have easily been attached.

12. *United States* v. *Bozada,* No. 71-1727 (8th Cir. 1972).

13. *United States* v. *Bozada,* 473 F.2d 389 (8th Cir. 1973) (en banc). In fact, one of the panel judges changed his position and voted to uphold the search after the *en banc* hearing.

states in the Eighth Circuit and which we cited to the *en banc* court in *Bozada:*[14]

- *Arkansas: Chicot County:* Sheriff Max Brown polices 642 square miles with the help of two regular deputies. The highway patrol has two troopers assigned to the county. There are four part-time justices of the peace and no circuit judges in Chicot County. Two U. S. highways pass through the county.
- *Iowa: Ringgold County:* Sheriff E. T. Strange patrols 538 square miles with the help of one deputy. The highway patrol has one trooper assigned to the county; there are three part-time judges in Ringgold County. However the sheriff advises that occasions arise in which they are out of town and it might be necessary to go to another county to procure a search warrant.
- *Minnesota: Lake of the Woods County:* Sheriff Emmett Chilgren polices 1,311 square miles without the help of a regular deputy. The highway patrol has a single trooper assigned to the county. The county justice of the peace position was recently vacated, although Lake of the Woods County shares a county judge with two other counties. The county seat is Baudette, but the county judge may be holding court in Hallock, in Kittson County, a round-trip of 264 miles from Baudette. Snow falls up to 74 inches per year in the area, and the annual low temperature for the region is –34° F; the ground has more than an inch of snow on the average of 140 days a year. Sheriff Chilgren stated to counsel that a search warrant could take as long as two days to obtain under adverse circumstances.

14. The information was confirmed or updated as of November 8, 1978 by personal conversation between counsel for *amicus curiae* and most of the county sheriffs involved, or other successors in office.

- *Missouri: Barry County:* Sheriff Edwin Dummit polices 789 square miles with the help of four deputies. The highway patrol has two troopers assigned to the county. There is only one magistrate and one circuit judge in Barry County.
- *Nebraska: Sioux County:* Sheriff Tom Broderick patrols 2,063 square miles with the help of one deputy. The highway patrol does not have a trooper regularly assigned to the county. There is only one county judge in Sioux County.
- *North Dakota: Sheridan County:* Sheriff Leonard Hanson polices 989 square miles and has no regular deputies. The highway patrol does not station a trooper there. A single justice of the peace is the only judicial officer in Sheridan County. The average annual snowfall is 52 inches, the annual low temperature is —45° F, and more than one inch of snow is on the ground over 120 days a year.
- *South Dakota: Buffalo County:* Sheriff Francis E. Healey patrols 482 square miles with the help of one county deputy. The highway patrol does not have any troopers regularly assigned to the county. There are two part-time justices of the peace in Buffalo County.

The same is almost assuredly true of other rural areas in every state in this country. The waiting period while law enforcement officers obtain search warrants can involve quite an extended time period.

We submit that any kind of *per se* rule which requires a search warrant before any hand-luggage can be searched could cause major delays in time, which delays would, in turn, frustrate the law enforcement process and which might well cause the lengthy detention (albeit lawfully) of persons arrested on probable cause.

We wish to make it clear that we are in no way advocating a relaxation of the "probable cause" standard itself. This is fixed by law and court decision, and properly so. The instant case (and even *Chadwick*) presupposed that the police had a probable cause, in the legal sense, to make their search. All that we are advocating is the point that, *once probable cause is established*, law enforcement officers should be granted the power to search moveable hand luggage contained in an automobile or other vehicle, *at the time and place* of the arrest or stop.

A 200-pound double-locked footlocker which is in the unquestioned control of federal agents, at the federal building after the suspects (and their automobile) are in secure custody is a far cry from the situation in which a readily moveable unlocked suitcase is in the trunk of a taxicab which has been stopped on a pubilc highway, and a search is made prior to placing the suspects under arrest. In the latter class of cases, the police should have the authority to make an on-the-scene search. Such authority (again assuming that probable cause exists) will allow the police to make a decision as to whether a crime has actually been committed, and will eliminate hours of waiting, for the police; and for the suspects, if they should happen to be innocent.

Mr. Justice Blackmun, dissenting in *Chadwick, supra,* regretted that the Court did not take the opportunity in that case to "develop a clear doctrine concerning the proper consequences of custodial arrest." 433 U.S., at 17-18. The instant case presents such an opportunity; and we submit that, for the reasons set forth above, searches of moveable hand luggage contained in an automobile, which are made contemporaneously with a stop or arrest and which are based upon probable cause, should be held constitutionally permissible under the Fourth Amendment to the Constitution of the United States. We submit that such circumstances, in and of themselves, create one sort of exigency which this Court found to be lacking in *Chadwick*.

CONCLUSION.

To require that a search warrant be procured before moveable hand luggage, seized with probable cause in a vehicle, can be searched is an unrealistic interpretation of the Fourth Amendment. The realities of police work dictate that, in many cases, the requirement of a search warrant would be impracticable. We urge this Court to reverse the judgment of the Supreme Court of the State of Arkansas.

Respectfully submitted,

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